No. 12,155

IN THE

United States Court of Appeals

For the Ninth Circuit

FILIPINO FEDERATION OF AMERICA, INCORPORATED,
Appellant,

vs.

STANLEY NICHOLSON, a minor, by Edward J. Nicholson, next friend and guardian ad litem,
Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF OF APPELLANT.

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I.

That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error heretofore issued by the above-entitled court. Although the order quashing the writ of error does not, in terms, set forth the grounds for such order, it must, by implication, be found that the court based its order on the grounds set forth in the motion to strike and quash writ of error, filed October 28, 1948, to-wit:

"That at the time or prior to the filing of the application for a writ of error and at the time or prior to the issuance of the writ of error no bond of any nature whatsoever in any shape or form was filed with the clerk of this court in favor of the movant conditioned for the payment of the judgment entered in the Circuit Court of the First Judicial Circuit in the sum of $9,712.70 in case of failure to sustain the writ of error, all as provided for in Section 9557 of the Revised Laws of Hawaii 1945," and

That the error of the Supreme Court of the Territory of Hawaii, as alleged in this assignment consists in the failure of the Supreme Court to find that the purpose of an appeal bond is to provide security for the adverse party and that the requirement of an appeal bond is not jurisdictional (pages 19-20, inclusive of Record) 6

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That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error in denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein

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"Section 4. Wherever provision is made in Revised Laws of Hawaii 1935, as amended, for the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal to the Circuit or on writ of error exceptions or appeal to the Supreme Court, such provision is repealed."

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And that Section 9557, Revised Laws of Hawaii 1945, which section requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii 1935, is ambiguous inasmuch as the aforesaid Act 19, Session Laws of Hawaii 1939, is cited as an amendment incorporated therein (Record, page 21) 18

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That the Supreme Court of the Territory of Hawaii erred in entering judgment quashing the writ of error and denying the petition for rehearing because of failure to file an appeal bond prior to the issuance of the writ of error herein on the following grounds:

In construing the meaning of money judgment in Section 2529, Revised Laws of Hawaii 1925 (now Section 9557, Revised Laws of Hawaii 1945), it was held by the Supreme Court of the Territory of Hawaii in Edward Kuapuhi, also known as E. J. Kuapuhi, and Keakaku (#) V. Catherine K. Pa and McBryde Sugar Company, Limited, 31 Hawaii 623, that a judgment for costs is a money judgment. The Supreme Court of the Territory of Hawaii, incorporated in its per curiam denying the petition for rehearing, dated November 19, 1948, and upon which per curiam decision the judgment of the Supreme Court appealed from herein is based, the following language:

"* * * The 1939 Statute (meaning Act 19, Session Laws of Hawaii 1939. See Assignment V, supra) referred to

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amended Section 3556, supra (Revised Laws of Hawaii 1935, formerly Revised Laws of Hawaii 1925, Section 2529, and now Revised Laws of Hawaii 1945, Section 9557), but did not repeal the provision requiring a bond to pay the judgment. It did repeal a provision for the filing of a bond or the deposit of cash in lieu thereof to cover costs on writ of error, exceptions or appeal, to the Supreme Court. The 1939 Statute did not, therefore, justify the failure to file the bond required by Section 9557, supra. Under the circumstances this court did not acquire jurisdiction of the cause."

In view of the decision of the Supreme Court heretofore referred to in 31 Hawaii 623, coupled with the fact that the costs were merged in the judgment of the Circuit Court from which the writ of error was issued by the Supreme Court, the provisions of Section 4, Act 19, Session Laws of Hawaii 1939, dispensed with the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal, under the limited interpretation given said Section 4, Act 19, Session Laws of Hawaii 1939, by the Supreme Court of the Territory of Hawaii in the aforesaid per curiam decision; and it follows that the entirety of the Circuit Court judgment was non separable for appellate review procedure. So, if as the Supreme Court Rules in the said per curiam decision a bond is not required for costs—a judgment for costs being a money judgment—no appeal bond was necessary for the Supreme Court to acquire jurisdiction and for the issuance of the writ of error to bring up the Circuit Court judgment in its entirety for appellate review (Record, pages 22-24) 26

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No. 12,155

IN THE

United States Court of Appeals

For the Ninth Circuit

FILIPINO FEDERATION OF AMERICA, INCORPORATED, *Appellant,* vs. STANLEY NICHOLSON, a minor, by Edward J. Nicholson, next friend and guardian ad litem, *Appellee.*	

On Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF OF APPELLANT.

OPINION BELOW.

The judgment of the Supreme Court of the Territory of Hawaii was filed on November 27, 1948, pursuant to the decision and opinion of the said Court made and entered on the 10th day of November, 1948, quashing the writ of error and the decision and opinion on petition for rehearing rendered and filed on the 19th day of November, 1948. (Rec. pp. 7-16.)

STATEMENT OF THE PLEADINGS AND THE FACTS.

This cause has come to this Court upon the appeal of the appellant, Filipino Federation of America, Incorporated, from the judgment of the Supreme Court of the Territory of Hawaii entered November 27, 1948.

The appellant invokes the jurisdiction of this Court under Section 128A of the Judicial Code as amended by Act of February 13, 1925. (28 U.S.C.A. Sec. 225.)

In the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, on the 29th day of July, 1948, a judgment was made and entered for the appellee herein, and against the appellant, for the sum of Nine Thousand Six Hundred Twelve and 70/100 Dollars ($9612.70) together with the sum of $100.00, allowed as cost to the appellee, or a total of $9712.70. (Rec. p. 2); thereafter, within the time prescribed by law appellant applied for and a writ of error was issued on the 27th day of October, 1948, by the Supreme Court of the Territory of Hawaii. (Rec. p. 3.)

In the Supreme Court of the Territory of Hawaii, the appellee filed a motion to strike and quash the said writ of error upon the grounds therein stated. (Rec. pp. 4-5.)

The Supreme Court sustained the motion to strike and quash and by written order dated November 3, 1948 quashed the said writ of error. (Rec. pp. 7-8.)

On November 8, 1949, the appellant filed its petition for rehearing and for vacation of the order quashing writ of error. (Rec. pp. 8-11.)

The Supreme Court of the Territory of Hawaii, by its judgment, made, entered and filed on November 27,

1948, pursuant to the decision and opinion of the said Court, made and entered on the 10th day of November, 1948, quashing the writ of error and the decision and opinion on petition for rehearing rendered and filed on the 19th day of November, 1948, denied the petition for a rehearing on the motion to quash the writ of error. Within the time prescribed by law, appellant filed his petition for appeal to this Court and assignment of errors, which petition was duly allowed and which appeal has been perfected to this Court.

STATEMENT OF THE CASE.

There was a judgment in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, for the appellee and against the appellants herein in the sum of $9712.70, that sum including $100.00 as costs assessed against said appellant. (Rec. p. 2.)

Thereafter, within the time allowed by law, appellant applied for a writ of error, which writ of error was issued by the Supreme Court of the Territory of Hawaii on October 27, 1948. (Rec. p. 3.)

On October 28, 1948, appellee herein filed his motion to strike and quash the writ of error (Rec. pp. 4-5), on the ground that appellant had, at the time or prior to the issuance of the writ of error, failed to comply with the provisions of Section 9557, Revised Laws of Hawaii, 1945. (Rec. pp. 4-5.)

Upon a hearing on the motion to quash the writ of error, the said Supreme Court made its order quashing

the writ of error heretofore issued to the appellant. (Rec. pp. 7-8.)

On November 9, 1948, appellant submitted and filed in the Supreme Court of Hawaii a petition for rehearing, alleging that the order of the Supreme Court quashing the writ of error should be vacated, on the following grounds:

1. That the Supreme Court failed to consider that Section 4, Act 19, of Sessions Laws of Hawaii, 1939, deleted the requirement of Section 3556, Revised Laws of Hawaii, 1935 (Section 9557, Revised Laws of Hawaii, 1945) for the filing of a bond where there is a money judgment, as well as the filing of a bond for costs. (Rec. pp. 8-9.)

2. That the sole apparent purpose of an appeal bond is to provide security for the adverse party. (Rec. p. 9.)

3. That Section 9557, Revised Laws of Hawaii, 1945, is a remedial statute relating to procedure and, therefore, should be liberally construed. (Rec. pp. 9-10.)

4. That remedial statutes should receive an equitable interpretation so as more effectually to meet the beneficial end in view and prevent a failure of the remedy. (Rec. p. 11.)

The Supreme Court of Hawaii on November 19, 1948, by its per curiam decision, denied the petition for rehearing on this ground: That

> "The 1939 statute referred to amended section 3556, supra, but did not repeal the provision

requiring a bond to pay the judgment. It did repeal a provision for the filing of a bond or the deposit of cash in lieu thereof to cover costs on writ of error, exceptions or appeal, to the supreme court. The 1939 statute did not, therefore, justify the failure to file the bond required by section 9557, supra. Under the circumstances this court did not acquire jurisdiction of the cause." (Rec. pp. 14-15.)

On December 11, 1948, appellant herein filed its petition for appeal, for the reasons and grounds specified in the assignment of errors as set forth in the record (Rec. pp. 17-18), and on the said date, an order allowing appeal was signed by the Chief Justice of the Supreme Court of Hawaii. (Rec. p. 30.)

SPECIFICATIONS OF ASSIGNED ERROR.

The appellant relies upon assignments of error numbered I, II, III, IV, V and VII, as set forth in the assignment of errors herein appearing on pages 19 to 24 of the record. At this time, with the consent of this Honorable Court, appellant wishes to waive argument on Assignment of Error VI, contained on page 22 of the record.

ARGUMENT.

I.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR HERETOFORE ISSUED BY THE ABOVE-ENTITLED COURT. ALTHOUGH THE ORDER QUASHING THE WRIT OF ERROR DOES NOT, IN TERMS, SET FORTH THE GROUNDS FOR SUCH ORDER, IT MUST, BY IMPLICATION, BE FOUND THAT THE COURT BASED ITS ORDER ON THE GROUNDS SET FORTH IN THE MOTION TO STRIKE AND QUASH WRIT OF ERROR, FILED OCTOBER 28, 1948, TO-WIT:

> "THAT AT THE TIME OR PRIOR TO THE FILING OF THE APPLICATION FOR A WRIT OF ERROR AND AT THE TIME OR PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR NO BOND OF ANY NATURE WHATSOEVER IN ANY SHAPE OR FORM WAS FILED WITH THE CLERK OF THIS COURT IN FAVOR OF THE MOVANT CONDITIONED FOR THE PAYMENT OF THE JUDGMENT ENTERED IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN THE SUM OF $9,712.70 IN CASE OF FAILURE TO SUSTAIN THE WRIT OF ERROR, ALL AS PROVIDED FOR IN SECTION 9557 OF THE REVISED LAWS OF HAWAII 1945," AND

THAT THE ERROR OF THE SUPREME COURT OF THE TERRITORY OF HAWAII, AS ALLEGED IN THIS ASSIGNMENT CONSISTS IN THE FAILURE OF THE SUPREME COURT TO FIND THAT THE PURPOSE OF AN APPEAL BOND IS TO PROVIDE SECURITY FOR THE ADVERSE PARTY AND THAT THE REQUIREMENT OF AN APPEAL BOND IS NOT JURISDICTIONAL. (Pages 19-20, inclusive, of Record.)

II.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR IN DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE SECTION 9557, REVISED LAWS OF HAWAII 1945, IS REMEDIAL LEGISLATION AND COMPLIANCE THEREWITH IS NOT A CONDITION PRECEDENT TO THE PROSECUTION OF SAID WRIT OF ERROR. (Page 20 of Record.)

III.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE SUCH ACTIONS OPERATED TO DEPRIVE THE DEFENDANT, PLAINTIFF IN ERROR, FROM HAVING A REVIEW OF ALLEGED ERRORS COMMITTED TO ITS PREJUDICE BY THE TRIAL COURT. (Page 20 of Record.)

IV.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE SECTION 9557, REVISED LAWS OF HAWAII 1945, IS A STATUTE PERTAINING TO PROCEDURE AND SHOULD BE LIBERALLY CONSTRUED. (Page 21 of Record.)

Inasmuch as Assignments of Error I, II, III and IV involve substantially the same issues of law, they will be combined for the purpose of argument.

A.

Appellant herein maintains that the purpose of an appeal bond is solely to provide security for the adverse party during the pendency of the appeal and is designed and should operate only as a stay of execution. The case of *Tooker v. Missouri Power & Light Company,* 336 Mo. 592, 80 S. W. (2d) 691, 101 A.L.R. 365, emphatically sets forth the contention of appellant. In that case the defendant failed to file an appeal bond, as required by a Missouri statute, substantially the same as the Hawaii statute in question.

The Court, in overruling the motion of the plaintiff to dismiss the appeal for the above failure, stated:

> "It is the policy of the law, as evidenced by statutory provisions on the subject, to allow appeals from final judgments to the end that the losing party may have a review of alleged errors committed to his prejudice by the trial court. It is evidently the legislative belief that the ends of justice are thus best subserved. The right of appeal is statutory, but, no doubt having in mind this salutary legislative purpose, this court said, in Stid v. Mo. Pac. Ry. Co., 211 Mo. 411, 418; 109 S. W. 663, 665, that 'an appeal being the creature of the statute, the object to be subserved being to get at the very right of the cause, statutes pertaining to procedure are entitled to a liberal construction, and courts should not be prone to plant thorns in the path of appeal.' That was said in holding that a judgment might be treated as final for the purpose of an appeal, though a motion in arrest of judgment had not been passed upon. In Hurley v. Universal Clay Co., 278 Mo. 408, 415; 213 S. W. 28, it is said that the right to an appeal, though purely statutory, is remedial and therefore to be liberally construed, citing the Stid Case."

On the basis of the preceding authority, appellant asserts, in accordance with a liberal and just viewpoint, that it should be entitled to a review of its case on the merits; that for the mere failure to file the statutory appeal bond allegedly required in Section 9557, Revised Laws of Hawaii, 1945, appellee had ample protection in that execution could then imme-

diately issue against appellant. To hold otherwise would be, to restate a portion of the case of *Tooker v. Missouri Power & Light Company,* quoted above, "planting thorns in the path of appeal".

B.

Section 9557, Revised Laws of Hawaii, 1945, is remedial legislation and should be liberally construed. As stated in 2 American Jurisprudence, Appeal and Error, Section 7:

> "Statutes giving and regulating the right of appeal are recognized as remedial in their nature and should receive a liberal construction in furtherance of the right of appeal."

Chapter 186, Revised Laws of Hawaii, 1945, Sections 9551 to 9664, inclusive, which governs the issuance of writs of error is clearly a chapter giving and regulating the right of appeal, and thus remedial in its nature.

Section 9551 of Chapter 186, Revised Laws of Hawaii, 1945, states:

> "A writ of error, returnable to the supreme court, may be issued by the clerk, or any deputy clerk or assistant clerk of the supreme court, upon the application of any party deeming himself aggrieved by the judgment of a circuit court, the land court, or a district magistrate, or by the order or decree of a circuit judge at chambers, at any time before execution thereon is fully satisfied, within ninety days from the entry of which judgment, order or decree and the sentence of the court in a criminal case shall be the judgment."

Section 9551 is substantially the same and is derived from "An Act to define writs of error" (Session Laws, 1892, pp. 272, 275), approved and enacted into law by the legislature of the Kingdom of Hawaii in January, 1893, and reading as follows:

> "Section 1 A writ of error may be had by any party deeming himself aggrieved by the decision of any Justice, Judge or Magistrate, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment.
>
> Section 3 A writ of error may be had to correct any error appearing on the record, either of law or fact, or for any cause which might be assigned as error at common law; provided, however, that no writ of error shall issue for any defect of form merely in any declaration, nor for any matter held for the benefit of the plaintiff in error."

As early as 1902, in the case of *Holloway v. Brown,* 14 Haw. 170, it was recognized and affirmed, and it has never been denied to this date, that a writ of error is a form of appeal. The Court stated therein, referring to the legislation of 1893:

> "* * * The writ authorized by this statute is broader than the common law writ of error and seems to cover all cases, except as otherwise provided in the statute, that might be brought up for review by appeal or exceptions and to be a concurrent method, with appeal and exceptions, for presenting causes to this court."

And again:

> "The writ has issued from this Court to review alleged errors in a decree in equity (Vierra v. Hackfeld, 8 Haw. 436); to review proceedings in Probate in the Circuit Court (Phelps v. Carter, 9 Haw. 638); the decision of a district magistrate (Lee Yau, et al. v. The Republic, 11 Haw. 143); the decision of a Circuit Judge (V. S. & T. Co. v. Hayashi, 13 Haw. 695); the verdict of a jury rendered in the Circuit Court (Pringle v. H. M. Co., Id. 705)."

Inasmuch as a writ of error is a form of appeal, it is remedial and should be liberally construed.

As stated in 50 *American Jurisprudence,* Statutes, Section 392:

> "It is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute * * * The rule also applies to statutes having for their design the simplification of procedure and the removal of technicalities in connection therewith."

And again, in

> *50 American Jurisprudence,* Statutes, Section 386:

> "A statute entitled to a liberal construction should be fairly or favorably construed, so as to give it, if possible, a beneficial operation, and one which would tend to promote and effectuate justice, in the interest of the public good, and avoid harsh or incongruous results. The Courts should give, not stintedly or niggardly, but freely and generously, all the statute purports to give."

3 Corpus Juris 319 states:

> "As a general rule a statute or constitutional provision conferring, extending, or regulating the right of appeal ought not to be abridged by strict construction; but on the contrary, being remedial, it should be liberally construed, and especially, when the constitution guarantees the right of appeal, a statute regulating the exercise of the right should be so interpreted as most certainly and effectually to attain this object. A statute will not be construed as taking away the right of appeal unless the language used clearly shows such an intent."

In summarizing this argument, appellant concludes that Chapter 186, Revised Laws of Hawaii 1945, Sections 9551 to 9664, inclusive, governing writs of error, is a chapter giving and regulating the right of appeal and that Chapter 186, which includes Section 9557, is therefore remedial legislation and should receive a liberal construction.

The effect of the decision of the Supreme Court of Hawaii in its strict holding that the appellant herein failed to comply with the provisions of Section 9557, Revised Laws of Hawaii, 1945, and thereby was not entitled to a hearing on its writ of error, is to penalize appellant and create a forfeiture, all of which is contrary to the liberal spirit of remedial legislation.

C.

The view expressed by the Supreme Court of Hawaii with respect to the case now on appeal in this Court is that the provisions of Section 9557, Revised

Laws of Hawaii, 1945, are jurisdictional and not procedural. Appellant denies the correctness of this conclusion and maintains that Section 9557 is solely a procedural statute, and as such should be liberally construed.

In order to determine whether or not Section 9557, Revised Laws of Hawaii, 1945, is jurisdictional or procedural, it must first be determined where the Courts acquire jurisdiction. The following statement appears in 2 American Jurisprudence, Appeal and Error, Section 12:

> "The extent of appellate jurisdiction is controlled by the Constitution and statutes creating the court whose jurisdiction is in question, and these must be consulted on the question."

Section 81 of Chapter IV of the Organic Act, providing a Government for the Territory of Hawaii, states with respect to the judiciary branch:

> "Sec. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

Thus, the Organic Act is in the nature of a constitution to the territorial legislature, but it confers on the legislature the power to organize the courts and fix their jurisdiction.

The legislature of Hawaii definitely granted jurisdiction to the Supreme Court of Hawaii with respect to the hearing of writs of error by virtue of the following statutes, Revised Laws of Hawaii, 1945:

> "Sec. 9551. A writ of error, returnable to the supreme court, may be issued by the clerk, or any deputy clerk or assistant clerk of the supreme court, upon the application of any party deeming himself aggrieved by the judgment of a circuit court, the land court, or a district magistrate, or by the order or decree of a circuit judge at chambers, at any time before execution thereon is fully satisfied, within ninety days from the entry of which judgment, order or decree and the sentence of the court in a criminal case shall be the judgment.
>
> Sec. 9555. *A writ of error may be had as of right* in term time or in vacation *upon the application* of a defendant in a criminal case or of *any party in a civil case,* or of any legal or personal representative of a deceased party in a civil case." (Emphasis supplied.)

Inasmuch as the Legislature of Hawaii did not record its intent with respect to the applicability of Section 9557, an examination of the cases in which this statute is involved, must be conducted. A review of the cases is revealing. It is noted that, in spite of the express jurisdictional grantings of Sections 9551 and 9555, with respect to Chapter 186, Revised Laws of Hawaii, 1945, the Supreme Court of Hawaii has nevertheless wavered and been indecisive on the question of whether Section 9557 is a jurisdictional or a procedural statute.

In the case of *W. Au Hoy v. Ching Mun Shee,* 33 Haw. 239, the plaintiff did not comply with Section 2529 Revised Laws of Hawaii, 1925 (Section 9557, Revised Laws of Hawaii, 1945), in failing to file the required bond within the specified period. The Court refused to consider the writ of error, claiming lack of jurisdiction. However, there was a vigorous dissent from the majority view, expressing in strong and forceful language that the literal construction of the statute by the majority was entirely contrary to its purpose and spirit.

The case of *Akana v. Espinda,* 33 Haw. 314, was a per curiam opinion, based on and following the authority of the *W. Au Hoy v. Ching Mun Shee* case.

In the case of *Territory v. L. I. S. N. Co.,* 33 Haw. 890, the defendant did not, prior to the issuance of the writ of error, comply with the provisions of Section 3556, Revised Laws of Hawaii, 1935, (Section 9557, Revised Laws of Hawaii, 1945). The Court reached the conclusion *that the statutory bond was a procedural and not a jurisdictional* matter and hence could be waived. An appropriate portion of the opinion is stated:

> "Prior to the argument of the case on its merits doubt was expressed by a member of the court as to whether the giving of a statutory bond was necessary to the jurisdiction of the court and therefore could not be waived by consent of the parties. The court requested briefs on this question. Counsel for the defendant in error asked to be excused from filing a brief on the ground that it might be inconsistent with the stipulation of

his client. Thereupon the court appointed Mr. Carl Wendell Carlsmith, a member of the bar, as amicus curiae to render to the court the required service. Elaborate and able briefs were accordingly filed by council for plaintiff in error and by the amicus curiae. After careful study of the question the court reached the conclusion that the statutory bond was a procedural and not a jurisdictional matter and hence could be waived. The case is therefore considered on its merits."

Hilo Finance v. De Costa, 34 Haw. 47, quoted with approval and followed the case of *Territory v. L. I. S. N. Co.,* in holding that the filing of a bond as provided by Section 3556, Revised Laws of Hawaii, 1935, (Section 9557, Revised Laws of Hawaii, 1945), as a condition precedent to the issuance of a writ of error is not a jurisdictional requirement but merely procedural and may be waived.

In the case of *Marks v. Waiahole Water Co.,* 36 Haw. 188, decided on June 27, 1942, the Court stated:

"In that there was a failure to file the required bond, the writ did not validly issue and neither the court, nor any justice, has the power or authority to ratify its improper issuance or to waive the express requirements of the statute in respect to filing a bond."

However, in this case there was again a strong dissenting opinion rebelling against such a strict and literal construction of Section 9557. The closing paragraph of the dissent states:

"The motion to dismiss should be denied with the idea of bringing about, along with security for

> the defendant in error, a full and fair opportunity for the plaintiffs in error to have this court review the alleged errors of the trial court. The lawmaking body by its distinctly remedial legislation, so intended."

The case of *R. W. Meyer, Ltd. v. McGuire,* 36 Haw. 184, decided on *July 6, 1942,* involved the motion of the defendant in error to dismiss the writ of error issued on behalf of the plaintiff in error. An appropriate portion of the opinion of the Court is hereby quoted:

> "Of the *procedural* grounds of the motion one is that the bond filed by plaintiff in error pursuant to the provisions of Revised Laws of Hawaii, 1935, Section 3556, was prematurely filed." (Emphasis supplied.)

In view of the provisions of Sections 9551 and 9555, Revised Laws of Hawaii, 1945, in view of the fact that in the cases of *W. Au Hoy v. Ching Mun Shee,* 33 Haw. 239, and *Marks v. Waiahole Water Co.,* 36 Haw. 188, which held that the requirements of Section 9557 were jurisdictional, there were strong dissenting opinions, and in view of the fact that in *R. W. Meyer, Ltd. v. McGuire,* 36 Haw. 184, the most recent controlling case in point of time, the Supreme Court of Hawaii indicated that Section 9557 was procedural, appellant submits in summary that Section 9557, Revised Laws of Hawaii, 1945, is procedural and as such should be liberally construed and not made a condition precedent to the issuance of a writ of error.

V.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE THE REQUIREMENT OF AN APPEAL BOND WAS DELETED BY THE LEGISLATURE OF THE TERRITORY OF HAWAII BY VIRTUE OF THE ENACTMENT OF ACT 19, SESSION LAWS OF HAWAII 1939, SECTION 4, OF WHICH ACT READS AS FOLLOWS:

> "SECTION 4. WHEREVER PROVISION IS MADE IN REVISED LAWS OF HAWAII 1935, AS AMENDED, FOR THE FILING OF ANY BOND OR THE DEPOSIT OF CASH IN LIEU OF BOND TO COVER COSTS ON APPEAL TO THE CIRCUIT OR ON WRIT OF ERROR EXCEPTIONS OR APPEAL TO THE SUPREME COURT, SUCH PROVISION IS REPEALED."

AND THAT SECTION 9557, REVISED LAWS OF HAWAII 1945, WHICH SECTION REQUIRES AN APPEAL BOND, IS A RESTATEMENT OF SECTION 3556, REVISED LAWS OF HAWAII 1935, IS AMBIGUOUS INASMUCH AS THE AFORESAID ACT 19, SESSION LAWS OF HAWAII 1939, IS CITED AS AN AMENDMENT INCORPORATED THEREIN. (Record, page 21.)

Section 3556, Revised Laws of Hawaii 1935, required the filing of an appeal bond, to-wit:

> "Section 3556. *Costs, bond.* No writ of error shall issue until the sum of twenty-five dollars has been deposited to cover costs, and, except in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.

"The Supreme Court shall have power to order additional bond upon motion, and to determine the amount of the penalty thereof and the sufficiency of the sureties to the same, or to the bond given before proceeding to a hearing on the writ."

This requirement of filing an appeal bond was eliminated and deleted by the enactment of Act 19, Session Laws of Hawaii 1939, Section 4 of which Act reads as follows:

"Section 4. Wherever provision is made in the Revised Laws of Hawaii 1935, as amended, for the filing of any bond or the deposit of cash in lieu of bond to cover costs on appeal to the Circuit Court or on writ of error, exceptions or appeal to the Supreme Court, such provision is repealed."

Section 9557, Revised Laws of Hawaii 1945, which section requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii, cited supra, and reads as follows:

"Section 9557. *Costs, bonds.* No writ of error shall issue until the sum provided by section 9746 has been deposited to cover costs, and, except in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in the original cause in case of failure to sustain the writ of error.

"The Supreme Court shall have power to order additional bond upon motion, and to determine the

amount of the penalty thereof and the sufficiency of the sureties to the same, or to the bond given before proceeding to a hearing on the writ. (L. 1892, c. 95, pt. of s. 8, s. 15; am. L. 1919, c. 44, s. 6; R.L. 1925, s. 2529; *R. L. 1935, s. 3556; am. L. 1939, c. 19, s. 4.)*" (Emphasis supplied.)

It is pointed out that Section 9557, Revised Laws of Hawaii 1945, which requires an appeal bond, is a restatement of Section 3556, Revised Laws of Hawaii 1935, and is ambiguous and obscure, inasmuch as the aforesaid Act 19, Session Laws of Hawaii 1939, is cited as an amendment incorporated therein, and because of the reason that the said Section 3556 unequivocally makes unnecessary the filing of an appeal bond.

What is the effect of Act 19, Session Laws of Hawaii, 1939? It absolutely makes unnecessary the filing of *any bond* on appeal to the Circuit Court or on writ of error, exceptions or appeal to the Supreme Court. Now what is the effect of Section 9557, Revised Laws of Hawaii, 1945? A close examination of that section will show that it apparently makes necessary a filing of a bond in favor of the prevailing party before a writ of error is to be issued. However, Section 9557, cited supra, has this additional feature: that in it there is cited Revised Laws, 1935, Section 3556, and next thereto, Act 19, Section 4, Session Laws of Hawaii, is cited as an amendment incorporated therein.

Obviously, then, Section 9557, Revised Laws of Hawaii, 1945, is highly ambiguous and obscure.

It is to be noted that Act 19 of the 1939 Session Laws, which makes unnecessary the filing of any bond on appeal, in time, was an earlier statute, than Section 9557, of the Revised Laws of 1945. It is said in 50 *American Jurisprudence,* Statutes, Section 38:

> "The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length."

Furthermore, it is stated that,

> "In any event, a later statute not declaratory in its terms may not be relied upon for the purpose of giving a construction to an earlier act plain in its terms. Where the legislative body has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express; it is not overthrown by any mere inferences or implications to be found in such subsequent legislation."
>
> 50 *American Jurisprudence,* Statutes, Section 337.

See also,

> *U. S. v. Gillis,* 95 U.S. 407, 24 L. Ed. 503;
> *District of Columbia v. Hutton,* 143 U.S. 18, 36 L. Ed. 60, 12 Sup. Ct. 369.

Act 19, Session Laws of Hawaii, 1939, states that:

> "Wherever provision is made in the Revised Laws of Hawaii 1935, as amended, for the *filing of any*

> *bond* or the deposit of cash in lieu of bond to cover costs on appeal to the circuit court or on writ of error, exceptions or appeal to the supreme court, such provision is repealed." (Emphasis supplied.)

The aforesaid section makes unnecessary the filing of any bond on appeals.

> "In the construction of a statute, the general rule is that the Court may write no limitations therein. As variously expressed, the statute may not be restricted, constricted, qualified, narrowed, or abridged."
>
> 50 *American Jurisprudence,* Statutes, Section 230.

In *Estabrook v. Royon,* 52 Ohio St. 318, 39 N.E. 808, 32 L.R.A. 805, it was held that, where a word is employed in a statute without qualification, it is to be understood in its integral, *and not in a partial or negative sense.*

Whitby v. Mots, 125 Minn. 40, 145 N.W. 623, 51 L.R.A. (NS) 645, holds that the Courts cannot interpolate restrictive words in a statute when there is naught to indicate an intention of the legislature so to limit its operation. In view of these authorities, it must be reasonable to hold that the term "any bond" as cited supra, was not restrictive or to be construed narrowly.

Furthermore, inasmuch as the aforesaid Act 19, Session Laws of 1939, Section 4, reads as follows, in part:

> "* * * any bond or the deposit of cash in lieu of bond to cover costs * * *."

the deletion of a requirement of a bond on appeal applies either to any bond or the deposit of cash in lieu of a bond to cover costs, in the alternative.

> "In its elementary sense, however, the word 'or' as used in a statute, is a disjunctive particle indicating an alternative. It often connects a series of words or prepositions, presenting a choice of either. If the disjunctive conjunction 'or' is used, the various members of the sentence are to be taken separately."
>
> 50 *American Jurisprudence,* Statutes, Section 281.

If appellant should admit for the purpose of argument that the aforesaid Act 19, Session Laws of 1939, Section 4, and its provisions are ambiguous and uncertain, nevertheless, it should be interpreted so as to give the appellant herein, the benefits of any doubt in its construction.

> "Where the language of a statute is ambiguous, the Courts will strive to avoid an interpretation imputing a design to distinguish between cases upon a course of reasoning too unsubstantial and too finely drawn for the regulation of human action, or producing arbitrary or incongruous results, or an anomalous, capricious, or senseless distinction or discrimination, or an unequal operation generally."
>
> 50 *American Jurisprudence,* Statutes, Section 372.

Section 9557, Revised Laws of Hawaii 1945, provides that an appeal bond is necessary. In Act 1, Section 6, Session Laws of Hawaii 1945, with respect to the construction of the Revised Laws of Hawaii 1945, it is provided that: (in part)

> "Section 6. *Construction of Revised Laws.* Provisions in the said sections and note shall be construed as continuations or amendments of applicable or corresponding provisions of previously existing laws and not as new enactments."

In view of the above quoted section, it would appear that the 1939 Act which makes unnecessary the filing of an appeal bond has not been repealed.

Further, it is said that:

> "The repeal of a statute is not to be inferred from a general and uncertain allusion to it in the repealing act."
>
> *The King v. Yung Hong,* 7 Haw. 359 (syllabus).

See also,

In re Okkots, 9 Haw. 402;
Republic of Hawaii v. Edwards, 12 Haw. 55;
Wahiawa Sugar Co. v. Waialua Agricultural Co., 13 Haw. 109.

VI.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN BECAUSE THE EFFECT THEREOF WAS TO TAKE PROPERTY OF DEFENDANT, PLAINTIFF IN ERROR, WITHOUT DUE PROCESS OF LAW AND WITHOUT AFFORDING HIM AN OPPORTUNITY TO HAVE ALLEGED ERRORS COMMITTED TO HIS PREJUDICE IN THE TRIAL COURT SUBJECTED TO APPELLATE REVIEW, ALL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. (Record, page 22.)

Assignment of Error VI is general in its scope, and since the determination of the issues involved herein depends upon the decision of this Court in the remaining assignments of error, for this reason argument will be deleted with leave of this Honorable Court.

VII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING JUDGMENT QUASHING THE WRIT OF ERROR AND DENYING THE PETITION FOR REHEARING BECAUSE OF FAILURE TO FILE AN APPEAL BOND PRIOR TO THE ISSUANCE OF THE WRIT OF ERROR HEREIN ON THE FOLLOWING GROUNDS:

IN CONSTRUING THE MEANING OF MONEY JUDGMENT IN SECTION 2529, REVISED LAWS OF HAWAII 1925 (NOW SECTION 9557, REVISED LAWS OF HAWAII 1945), IT WAS HELD BY THE SUPREME COURT OF THE TERRITORY OF HAWAII IN EDWARD KUAPUHI, ALSO KNOWN AS E. J. KUAPUHI, AND KEAKAKU (#) V. CATHERINE K. PA AND McBRYDE SUGAR COMPANY, LIMITED, 31 HAWAII 623, THAT A JUDGMENT FOR COSTS IS A MONEY JUDGMENT. THE SUPREME COURT OF THE TERRITORY OF HAWAII, INCORPORATED IN ITS PER CURIAM DENYING THE PETITION FOR REHEARING, DATED NOVEMBER 19, 1948, AND UPON WHICH PER CURIAM DECISION THE JUDGMENT OF THE SUPREME COURT APPEALED FROM HEREIN IS BASED, THE FOLLOWING LANGUAGE:

> "* * * THE 1939 STATUTE (MEANING ACT 19, SESSION LAWS OF HAWAII 1939. SEE ASSIGNMENT V, SUPRA) REFERRED TO AMENDED SECTION 3556, SUPRA (REVISED LAWS OF HAWAII 1935, FORMERLY REVISED LAWS OF HAWAII 1925, SECTION 2529, AND NOW REVISED LAWS OF HAWAII 1945, SECTION 9557), BUT DID NOT REPEAL THE PROVISION REQUIRING A BOND TO PAY THE JUDGMENT. IT DID REPEAL A PROVISION FOR THE FILING OF A BOND OR THE DEPOSIT OF CASH IN LIEU THEREOF TO COVER COSTS ON WRIT OF ERROR, EXCEPTIONS OR APPEAL, TO THE SUPREME COURT. THE 1939 STATUTE DID NOT, THEREFORE, JUSTIFY THE FAILURE TO FILE THE BOND REQUIRED BY SECTION 9557, SUPRA. UNDER THE CIRCUMSTANCES THIS COURT DID NOT ACQUIRE JURISDICTION OF THE CAUSE."

IN VIEW OF THE DECISION OF THE SUPREME COURT HERETOFORE REFERRED TO IN 31 HAWAII 623, COUPLED WITH THE FACT THAT THE COSTS WERE MERGED IN

THE JUDGMENT OF THE CIRCUIT COURT FROM WHICH THE WRIT OF ERROR WAS ISSUED BY THE SUPREME COURT, THE PROVISIONS OF SECTION 4, ACT 19, SESSION LAWS OF HAWAII 1939, DISPENSED WITH THE FILING OF ANY BOND OR THE DEPOSIT OF CASH IN LIEU OF BOND TO COVER COSTS ON APPEAL, UNDER THE LIMITED INTERPRETATION GIVEN SAID SECTION 4, ACT 19, SESSION LAWS OF HAWAII 1939, BY THE SUPREME COURT OF THE TERRITORY OF HAWAII IN THE AFORESAID PER CURIAM DECISION; AND IT FOLLOWS THAT THE ENTIRETY OF THE CIRCUIT COURT JUDGMENT WAS NON SEPARABLE FOR APPELLATE REVIEW PROCEDURE. SO, IF AS THE SUPREME COURT RULES IN THE SAID PER CURIAM DECISION A BOND IS NOT REQUIRED FOR COSTS—A JUDGMENT FOR COSTS BEING A MONEY JUDGMENT—NO APPEAL BOND WAS NECESSARY FOR THE SUPREME COURT TO ACQUIRE JURISDICTION AND FOR THE ISSUANCE OF THE WRIT OF ERROR TO BRING UP THE CIRCUIT COURT JUDGMENT IN ITS ENTIRETY FOR APPELLATE REVIEW. (Record, pages 22-24.)

At the outset, it may be pointed out that inasmuch as the Specification of Error No. VII is set out at some length and supported by argument therein, further elucidation would be somewhat repetitious, and consequently appellant will argue this specification only briefly.

The main issue in this appeal is whether the Supreme Court of the Territory of Hawaii did not or did have jurisdiction over the instant case, and the answer to that question lies in the determination of whether or not the filing of a bond was necessary.

Now in the case of *Kuapuhi v. Pa,* 31 Haw. 623, decided in 1930, which construed the meaning of a money judgment under Section 2529, Revised Laws of Hawaii 1925, presently Section 9557, Revised Laws

of Hawaii 1945, it was held that a judgment for costs is a money judgment. In that case the Court said,

> "It is conceded, as it must be, that the judgment for costs is a money judgment and that under Section 2529, R. L. 1925, it was necessary to the issuance of the writ to file a bond securing such costs." (pp. 624, case supra.)

The Supreme Court of the Territory of Hawaii, in its per curiam denying the petition for rehearing herein, stated that the 1939 statute, referring to Act 19, Session Laws of Hawaii 1939, did not repeal the provision requiring a bond to pay the judgment, but that what it did do was to repeal a provision for the filing of a bond or the deposit of cash in lieu of a bond to cover costs on writ of error, exceptions or appeal. It is essential to note that by this decision (Rec. pp. 14) it is plainly to be inferred that no bond is necessary or required in the case of costs.

It is seen that the Supreme Court has held that a judgment for costs is a money judgment. Also, it is a fact that in the instant case, the costs were mixed and merged in the money judgment of the Circuit Court, as is shown on page 2 of the record herein, which judgment shows that a money judgment was entered against the appellant for $9,612.70 together with $100.00 allowed as cost, or a total of $9,712.70, and that as a result the cost and judgment here are inseparable.

Now inasmuch as the Supreme Court has given Section 4, Act 19, Session Laws of Hawaii 1939, a

very limited interpretation, viz., that it merely deleted a requirement for the filing of a bond to cover cost, on appeal, and a judgment for costs is a money judgment, and because in the instant case the judgment was combined with costs, and therefore inseparable, no appeal bond was necessary for the issuance of the writ of error.

CONCLUSION.

Upon the reasoning hereinbefore advanced and authorities cited, appellant urges that the Supreme Court of Hawaii erred in quashing the writ of error and in denying petition for rehearing, and accordingly respectfully requests that this matter be remanded to the Supreme Court of Hawaii with appropriate directives as in the judgment of this Honorable Court may seem expedient and conducive to the interests of justice.

Dated at Honolulu, T. H.,
May 6, 1949.

Respectfully submitted,

ARTHUR K. TRESK,
Attorney for Filipino Federation of America, Incorporated, Appellant.